IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 612.

LEROY J. LEISHMAN, *Petitioner*,

v.

THE RICHARDS AND CONOVER COMPANY, a Corporation, *Respondent*.

BRIEF FOR RESPONDENT.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

CASES CITED.

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BRIEF FOR RESPONDENT.

In this case petitioner relies upon Rule 38(5b) of the Rules of this Court in support of his petition, but it is submitted that the instant case presents no reason or ground for the grant of certiorari such as required by the rule. Contrary to petitioner's assertion, there is no conflict of decision between the Courts of Appeal for the Ninth and Tenth Circuits with respect to the validity or infringement of the reissue letters patent (Re. 20,827) in suit.

The validity of the reissue patent in suit was first determined in the District Court for the Southern District of California and the patent held invalid for want of invention. *Leishman* v. *Associated Wholesale Electric Co.*, 36

F. Supp. 804. Upon appeal from that decision, the Court of Appeals for the Ninth Circuit found the patent not infringed and did not pass upon its validity, saying:

> "* * * The judgment declares that the claims 'are invalid for want of invention.' In the view we take, the declaration is unnecessary. As to its correctness or incorrectness, we express no opinion." *Leishman* v. *Associated Wholesale Electric Co.*, 137 F. 2d 722, 727.

In the instant case, the patent has been held invalid by the Tenth Circuit Court of Appeals for want of invention (R., p. 497, and on rehearing R., p. 576), the court reversing the decision of the District Court for the Western District of Oklahoma. There is therefore no conflict between the Ninth and the Tenth Circuits as to the validity of the reissue patent in suit.

The Ninth Circuit has twice held that the reissue patent in suit is not infringed by tuners of the identical type involved in the instant case. Following its first decision in *Leishman* v. *Associated Wholesale Electric Co.*, 137 F. 2d 722, the Ninth Circuit reiterated its decision in *Leishman* v. *Radio Condenser Co., et al*, 167 F. 2d 890. In the instant case, the Court of Appeals for the Tenth Circuit has elected to base its decision on its finding that the reissue patent in suit was invalid for want of invention. It did not hold the patent infringed, saying only (R., p. 502):

> "* * * we are unwilling to rest our decision on the narrow ground that the lever in the device of the patent in suit and the plunger in the accused device are not mechanical equivalents."

This is not a statement that the court considers the patent to be infringed.

This Court has but recently had before it petitioners' claim that there is a conflict between the decisions of the Ninth and Tenth Circuit Courts of Appeal in the above mentioned cases, and in denying petitioner a writ of cer-

tiorari in *Leishman* v. *Radio Condenser Co. and General Instrument Corp.*, No. 372 (rehearing denied, February 28, 1949), has in effect disposed of that claim. All of the decisions of the Ninth Circuit, and of the Tenth Circuit Courts of Appeal, now referred to by petitioner were before this Court when the rehearing was denied petitioner on February 28, 1949 (*supra*). In the absence of any such conflict, the petition in the instant case should be denied. *Layne & Bowler Corp.* v. *Western Well Works*, 261 U. S. 387, 43 S. Ct. 442; *Keller* v. *Adams-Campbell Co.*, 264 U. S. 314, 44 S. Ct. 356.

The alleged mechanical errors in the illustrative diagram accompanying the opinion of Judge Phillips on rehearing, if they were material which they are not, would obviously not furnish a basis for the grant of a writ of certiorari in the instant case. The instant case presents no novel question of patent law but only the application of settled principles of patent law to the facts as found by the court below. This court should not be called upon to review the determinations of mechanical fact by the Circuit Court below, and by the judge in the Southern District of California (36 F. Supp. 804). In his opinion on rehearing, Judge Phillips has set forth a mechanical analysis showing that the cause of creeping in a tuner would be apparent to a skilled mechanic and accompanied that analysis with an illustrative drawing. This involved no novel theory such as claimed in petitioner's brief, and none of the cases referred to in petitioner's brief apply to such a factual analysis. (See *Thomas* v. *Taylor*, 224 U. S. 73, 32 S. Ct. 403, cited but misapplied by petitioner)

It is idle for petitioner to assert that Judge Phillips disregarded the testimony of an expert in this case. Judge Phillips did not do so, but it was within his province to do so if he desired. It is elementary that the opinion of an expert is advisory only and that a court is free to reject such an opinion if the judge does not agree with it. *The Conqueror*, 166 U. S. 110, 132, 17 S. Ct. 510; *Anchor Co., Inc.*

v. *Commissioner of Internal Revenue*, 42 F. 2d 99, 100, (C. C. A. 4); *Tracy* v. *Commissioner of Internal Revenue*, 53 F. 2d 575, 577 (C. C. A. 6); *Wisconsin Alumni R. Foundation* v. *George A. Breon & Co.*, 85 F. 2d 166, 171 (C. C. A. 8); *Conmar Products Corp.* v. *Universal Slide Fastener Co.*, 172 F. 2d 150, 153 (Item (1)) (C. C. A. 2).

Respectfully submitted,

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